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No. 87-112

In The

Supreme Court of the United States

October Term, 1987

UNITED BROTHERHOOD OF CARPENTERS AND JOINTERS OF AMERICA, AFL-CIO LOCAL 2247, and TRUSTEES FOR THE ALASKA CARPENTERS HEALTH AND SECURITY FUND, RETIREMENT FUND, AND APPRENTICESHIP AND TRAINING FUND,

Petitioner,

vs.

ENDICOTT ENTERPRISES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Did the facts before the District Court support its finding that in this particular instance, the employer before it repudiated an 8(f) prehire agreement?

II. Does the NLRB have primary jurisdiction to determine the majority status of a union at a job site when the union never requested an election, and when the undisputed facts show that no union employee ever worked at that job site?

PARTIES TO THE PROCEEDINGS

Respondent is satisfied for the most part with petitioner's statement of the parties to the proceedings. It would add only that Endicott Enterprises, Inc. has no parent corporations, subsidiaries, or affiliates.

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STATEMENT OF THE CASE

Endicott Enterprises, Inc. operates a combined retail sporting goods, hardware and floral shop commonly known as "Ace Hardware" in Juneau, Alaska. The sole shareholders and officers of Endicott Enterprises are Warren and Marian Endicott. (E.R. 112, 113).[1] The Endicotts purchased Ace Hardware in 1979. Previously, Warren Endicott had worked in various administrative positions with the State of Alaska and Marian had been employed at home as a housewife and mother. (E.R. 222, 91-92).

Prior to 1982 the Endicotts had no experience as building contractors, nor had they or Endicott Enterprises, Inc. ever been a signatory to any union agreements. (E.R. 87). During late 1981 and early 1982 the Endicotts made plans for an addition to the Ace Hardware Building. In an effort to save funds, the Endicotts acted as their own general contractor for the project. The project was scheduled to commence some time during the summer or fall of 1982, dependent upon financing. (E.R. 87).

Al Stotz is a carpenter who first came to Alaska approximately 20 years ago. Mr. Stotz met the Endicotts in the early 1960's when he was their neighbor in Juneau. (E.R. 359).

In May of 1982 Warren Endicott offered to hire Mr. Stotz to do some carpentry work on the Endicotts' garage. (E.R. 224). Stotz said he would do the work but wanted to receive benefit payments pursuant to his membership

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[1]Citations are to the Excerpt of Record in the Appellate Court.

in the Carpenter's Union. (E.R. 370). Mr. Stotz then contacted Waino Korpela, the business agent for Carpenters Local 2247 in Juneau, who told Stotz to bring Mr. Endicott into the Union office to make the necessary arrangements. (E.R. 149-50). On or about May 12, 1982, Mr. Stotz brought Warren Endicott to the union hall where they had a very brief meeting with Mr. Korpela. (E.R. 374). Mr. Korpela described the meeting as follows:

> Mr. Stotz introduced Mr. Endicott to me and said that Mr. Endicott was to sign—was going to sign a contract so Mr. Stotz would get his fringe benefits.

(E.R. 151).

At some point after the meeting Mr. Stotz approached Marian Endicott, who was responsible for handling the payroll for the family business. Mr. Stotz presented Mrs. Endicott with a two page form entitled "Compliance Agreement Section" (E.R. 171-72) which he said she would have to sign for him to receive his pension benefits. (E.R. 92, 379). Mrs. Endicott signed the document pursuant to Stotz's request.

Mr. Stotz performed carpentry work on the garage located at the Endicott's Lemon Creek home between May 12 and May 25, 1982. During this time all required trust fund contributions were made on Mr. Stotz's behalf. (E.R. 120, 244). Mr. Stotz was employed exclusively at the garage site; at no time did Stotz, or any other union carpenter, perform any carpentry work at the Ace Hardware site. (E.R. 88-89, 293-294, 362-63, 385). On May 25, 1982, Mr. Stotz injured himself at the garage job site and filed for workers' compensation. (E.R. 119). While receiving workers' compensation payments from Endicott Enter-

prices, Mr. Stotz continued to reside as a guest in the Endicott's home. (E.R. 387). Upon recovering from his injury, Mr. Stotz took another job and temporarily left Juneau. (E.R. 385-86).

It is undisputed that the only Union worker ever employed by Endicott Enterprises, Inc. was Mr. Stotz. (E.R. 159, 293-94). It is undisputed that the only carpentry work performed by Mr. Stotz for the Endicotts was during the period of May 12-May 25, 1982 at the Lemon Creek garage location. (E.R. 362-63). It is undisputed that Endicott Enterprises, Inc. made the appropriate trust fund contributions to the fund for all work performed by Mr. Stotz during that period. (E.R. 120, 244). At no time did the Endicotts believe that they had obligated themselves to do anything more than make pension contributions on Mr. Stotz's behalf. (E.R. 90, 93).

LeRoy Peck replaced Waino Korpela as the Union's business agent on July 1, 1982. (E.R. 258). Approximately three months later, during early October, carpentry work began on the addition to the Ace Hardware building in downtown Juneau. (E.R. 88-89). The carpentry work was performed entirely by nonunion carpenters hired by Endicott Enterprises, Inc. from W. C. Construction Company. (E.R. 88-89, 123-24). The Ace Hardware construction site was located only 100-150 yards away from the Union office; so close "you could spit over there" in the words of the Union witnesses. (E.R. 372). Mr. Peck testified that from the very beginning of the project he knew that carpentry work was being performed and that it was being done on a nonunion basis. (E.R. 264, 266-67). He made these observations "when the building

started" just by walking past the site and observing the work being performed. *Id.* Al Stotz similarly confirmed that it was obvious the job was being done on a nonunion basis and that the business agent was aware of this fact. (E.R. 392-94). It is undisputed that the union had actual notice that the Ace Hardware job was being done on a totally nonunion basis. LeRoy Peck, business agent for the Union described the project as follows: "There was no union on there." (E.R. 298).

Despite actual notice of the nonunion nature of the job, Mr. Peck took no action concerning the Ace Hardware project during the next several months. Mr. Peck did not even attempt to contact Mr. Endicott until January of 1983. (E.R. 267). At approximately that time Mr. Peck unsuccessfully attempted to organize the nonunion workers on the project. (E.R. 270). Meanwhile, Mr. Stotz returned to Juneau and while attending a Union membership meeting complained about the fact that Warren Endicott was supposedly "under contract" to the Union. (E.R. 265). The union membership became increasingly upset with the fact that the Ace Hardware construction was being performed on a nonunion basis. (E.R. 396-98). Eventually the membership voted to commence picketing of the project in an effort to force the Endicotts to hire union labor for future phases of the project. (E.R. 89, 274-79). When the picketing efforts proved unsuccessful, the Union sued the Endicotts.

The Union sought to characterize this litigation as an action by the Alaska Carpenters Employee Benefit Trust Funds ("Trust Funds") to collect employee fringe benefit contributions. That characterization is inaccurate and

misleading. The action was brought by the Union, not the Trust Funds, and recovery of fringe benefit contributions was only an incidental portion of the Union's claim for relief (E.R. 5-6).[2] The lawsuit was filed immediately after the Union's organizing efforts and picketing had failed to persuade carpenters working for the Endicotts to join the Union. (E.R. 1, E.R. 89).

Although the Union instigated the lawsuit, it did virtually nothing to pursue the case. After 18 months had passed without any action by the Union, the Endicotts filed a motion for summary judgment in an effort to dispose of the litigation (E.R. 84). The Endicotts presented two arguments on summary judgment: (1) that the parties had never entered into a binding contractual relationship, and (2) that any contract entered into by the parties constituted a voidable "prehire agreement" which was thereafter lawfully repudiated by the Endicotts. The Union responded by cross-moving for summary judgment on both of these issues.

The District Court for the District of Alaska found that disputed issues of fact existed as to the original intent of the parties to enter into a contractual relationship and that summary judgment could therefore not be granted on that issue. The court determined, however, that as a matter of law: (1) the Endicotts' bold and open actions put the Union on notice of the Endicotts' intent to repudiate the contract, and (2) the Union had actual notice of

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[2]The Trust Funds did not become a party to the lawsuit until 1984 when the parties stipulated to the intevention of the Trust Funds as co-plaintiffs. For ease of reference, the Union and the Trust Funds are referred to jointly as "Union".

such repudiation. The court therefore granted summary judgment in favor of the Endicotts on the contract repudiation issue. In a separate order, the court found that the Union's action was "frivolous, unreasonable and without foundation" and awarded the Endicotts their attorney's fees pursuant to 29 U.S.C. Sec. 1132(g)(1).

The Union appealed the District Court's decision. The Ninth Circuit Court of Appeals rejected the Union's argument that the National Labor Relations Board had primary jurisdiction over the issue of the majority status of the Union at the Endicotts' job site. In addition, the Court of Appeals held that the actual notice provided to the Union of the work being done by non-union members at the job site constituted open and notorious conduct sufficient to repudiate the 8(f) prehire agreement between the Endicotts and the Union. Finally, the appellate court held that the award of attorney's fees to the Endicotts was an abuse of discretion on the part of the District Court and it reversed that portion of the District Court's order.

The Union petitioned for rehearing of the Ninth Circuit Court of Appeals decision, and in addition, moved for additional briefing and oral argument on what it described as "recently decided authority". The additional authority offered by the Union was a decision by the National Labor Relations Board in the case of *Deklewa, et. al. and Int'l. Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO,* 282 NLRB No. 184 (Feb. 20, 1987). The Court of Appeals denied the petition for rehearing and has never ruled on the motion for additional briefing and oral argument.

REASONS FOR DENYING THE WRIT

There are several compelling reasons why the petition for certiorari should not be granted.

I. Factual Issues Should Not Be Reviewed By The Supreme Court

First of all, the petitioner has presented no important questions that merit review by this court. Based on the facts presented to it in the cross-motions for summary judgment, the District Court rejected the Union's position and ruled in favor of the Endicotts. Based on those very same facts, the Ninth Circuit Court of Appeals upheld the District Court's decision. The essence of those decisions was that the facts warranted a finding that the actions of the Endicotts constituted notice of repudiation of the 8(f) agreement. There is no purpose served by this Court reviewing these same factual issues, this time at a third-hand remove.

This Court has held that: "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925); see *Texas v. Mead,* 465 U.S. 1041 (1984) (Stephens J.). Yet that is precisely what the Union is requesting. The District Court has already determined that the evidence supported a finding of repudiation (see Pet. at App. 34). Were this court to grant certiorari, it could not examine the undisputed facts any more closely than the District Court.

II. There Is No Conflict For This Court To Resolve

The Union has not pointed to any conflict among the federal circuit courts of appeal on the merits of the issue of what conduct constitutes notice of repudiation. In fact,

the only appellate level cases cited by the Union show that both the Eighth and Ninth Circuits agree that an 8(f) prehire agreement may be repudiated by conduct. The Ninth Circuit's decisions in this case and in *Carpenters Southern California Administrative Corporation v. J.L.M. Construction Company, Inc.*, 809 F.2d 594 (9th Cir. 1987) are in accord with the Eighth Circuit's decision in *Contractors Health and Welfare Plan v. Harkins Construction and Equipment Company*, 733 F.2d 1321, 1326 (8th Cir. 1984). All three of these cases held that open and notorious acts in derogation of a prehire agreement can constitute sufficient notice of repudiation.

These decisions are consonant with this court's ruling in *McNeff v. Todd*, 461 U.S. 260 (1983). In *McNeff*, this Court observed that all 8(f) contracts were inherently voidable, although the Court declined to name the specific acts that would constitute repudiation. Such a factual analysis is better left to the discretion of the trial courts.

The only conflict of authority discovered by the petitioner is between the above-cited appellate court decisions and a recent National Labor Relations Board ("NLRB") decision, *Deklewa, et al. and Int'l. Assoc. of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO*, 282 NLRB No. 184 (Feb. 20, 1987).

The NLRB in *Deklewa*, after a lengthy discussion of repudiation by conduct, announced a new direction in Board policy. Henceforth, the Board stated, employers and unions who sign 8(f) agreements will be obliged to abide by the terms of such agreements until such time as the employees, in a Board-conducted election, vote to reject or decertify the union. No other method of repudiation would be permitted.

The administrative agency decision in *Deklewa* may be indicative of future Board policy in this area, but it is not binding on the appellate courts or upon this Court. Furthermore, the *Deklewa* decision has had little opportunity to be tested in the world of labor law. If this Court is inclined to begin a policy of resolving conflicts between appellate court decisions and administrative agency decisions, *Deklewa* is a poor case with which to begin. At this point, it is too early to tell whether the policy change in *Deklewa,* and the reasons offered in support of it by the NLRB, will be adopted or qualified by the courts. In addition, there are two bills pending in Congress that deal with issues raised by the *Deklewa* decision (H.R. 281 and S. 492). This Courts should avoid ruling on an issue this is in such a state of flux.

III. The Deklewa Decision Does Not Apply Retroactively To Decided Cases

Even if the *Deklewa* decision were a conflicting ruling that this court should step in to resolve, it does not apply to the petition for certiorari now under consideration. The decision in *Deklewa* was handed down two months after the Ninth Circuit Court of Appeals decision in this case, two years after the District Court decision, and four years after Mr. Endicott hired Al Stotz to build a garage.

By its own terms, the NLRB decision in *Deklewa* does not apply to *Endicott.* The Board specifically discussed the potential retroactive affect of its decision and concluded that "we will apply the Board's new 8(f) principles to this case and to all pending cases in whatever stage." 282 NLRB No. 184, p. D-9 (BNA Feb. 25, 1987, No. 36). *Endicott is* no longer a pending decision. It has been decided by the Ninth Circuit Court of Appeals. The Union's peti-

tion for certiorari does not turn this already decided case into a pending matter.

IV. NLRB Jurisdiction

The Union has not suggested any reasons why this Court should grant certiorari to review the appellate court's decision on the primary jurisdiction issue. No such reasons exist. The District Court determined, as a matter of law, that the Union "never established a majority at the hardware store construction site." (Pet. App. 33-34). This conclusion was based on the undisputed fact that no union member ever worked at the hardware store site. If this Court were to grant certiorari and remand to the NLRB for a determination of majority status, the NLRB would be faced with the same undisputed facts that confronted the District Court. Whoever exercises jurisdiction will reach the same result—that there was no majority support at the hardware store site. There is therefore no point in a remand and no point in granting certiorari on the primary jurisdiction issue.

CONCLUSION

For the reasons stated above, this court should deny the petition for writ of certiorari. The petition does not raise any important issues that need to be decided by this court. No conflict will be resolved if this court grants certiorari. The federal circuit courts of appeal that have addressed the issue of repudiation have agreed upon the applicable legal standard. The NLRB decision in *Deklewa* may assist employers and unions in avoiding this same

problem in the future, and because the NLRB has effected a major policy change, it is inappropriate for the Supreme Court to now take up the same issue that the NLRB has so recently addressed.

RESPECTFULLY SUBMITTED this 12 day of August, 1987.

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